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No. 86-1852

In The

Supreme Court of the United States

October Term, 1986

HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

Cross-Petitioners,

v.

STATE OF FLORIDA, *et al.*,

Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Defendants/cross-respondents perceive no need to restate the "Questions Presented for Review" by plaintiffs/cross-petitioners.

PARTIES TO THE PROCEEDING

Defendants/cross-respondents adopt their statement of the "Parties to the Proceeding" set forth at pp.iii-v in their initial "Petition for Writ of Certiorari" (Sup. Ct. No. 86-1685) filed April 21, 1987. The only difference is that in this matter defendants are cross-respondents and plaintiffs are cross-petitioners, while in the initial matter (No. 86-1685) defendants are petitioners and plaintiffs respondents.

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PREFACE REGARDING PARTY AND RECORD REFERENCES

In this brief defendants will adopt and use the same method of party and record references which they used in their initial "Petition for Writ of Certiorari" (No. 86-1685) filed April 21, 1987, and which is detailed at pp. xi-xii of that initial petition.

Additionally, the cite herein of "A—" followed by a page number (e.g., "A128") refers to the appendix to defendants' initial petition for writ of certiorari in Case No. 86-1685. Should it be necessary to refer to the appendix to plaintiffs' cross-petition in the instant matter, such will be cited by the use of "PA—" followed by a page number (e.g., "PA121").

No. 86-1852

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HUGHLAN LONG, S. Dewey Haas, and Carl Rassler, individually and on behalf of all retired and present male employees subject to the Florida Retirement System established by Chapter 121, Florida Statutes, as well as the surviving joint annuitants of any deceased retired male employees,

Cross-Petitioners,

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STATE OF FLORIDA, *et al.*,

Cross-Respondents.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Defendants/cross-respondents State of Florida, *et al.*, respectfully request this Court deny the cross-petition for writ of certiorari seeking review of the 11th Circuit's decision in this case reported at 805 F.2d 1542 (1986), *reh. denied*, 805 F.2d 1552 (1987).

OPINIONS BELOW

The parties are in agreement as to opinions below. *See also* p.1 of defendants' initial petition for writ of certiorari (Sup. Ct. No. 86-1685) filed April 21, 1987.

JURISDICTION

The parties are in agreement as to jurisdiction. *See also* p.2 of defendants' initial petition (No. 86-1685).

STATUTES INVOLVED

Defendants agree with plaintiffs' listing of the statutes involved, except that defendants do *not* agree the Equal Pay Act of 1963 as amended, 29 U.S.C. § 206(d)(1), is involved in this case.

Specifically, the Equal Pay Act is not involved in this case because plaintiffs never raised an Equal Pay Act claim in the district court. *See generally* plaintiffs' initial complaint (R1-1-1 to 9), first amended complaint (R1-15-1 to 9), and second amended complaint upon which this matter ultimately proceeded (R4-55-3 to 11). *See also* the parties' district court pretrial stipulation which is set forth in the appendix to defendants' initial petition (specifically, at A93-A97, A118, and A118-A120).

Defendants further submit the additional statutes identified as involved at pp.3-4 in their initial petition (No. 86-1685) are also here involved and, accordingly, here adopt their statement of the "Statutes Involved" set forth at those pages of their initial petition.

STATEMENT OF THE CASE

Because plaintiffs' statement of the case fails to provide the full picture of what occurred, defendants here provide a more complete picture—even though the issue of bad faith would appear to be irrelevant.

At the outset the Court should note that the "principals" referred to in the district court's March 31, 1986 order (*see* A65; *see also* PA63) were defendant Smith, the Secretary (i.e., chief executive officer) of the State's Department of Administration at the time of the events complained of in this lawsuit and an initially named defendant in the trial court (*see* defendants' April 21, 1987 initial certiorari petition (Sup. Ct. No. 86-685) at p.iii n.2), and defendant McMullian, the Director (i.e., chief executive officer) of the Division of Retirement in the State's Department of Administration (*see* defendants' initial petition at p.iii).

The Court should also initially note that the conflict among federal regulations which it referenced in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 720 n.37 & 714 n.26 (1978) ("*Manhart*"), became a reality in this case with respect to the Florida Retirement System ("FRS").

Specifically, in October and November of 1978 two charges were filed with the civil rights division of the then U.S. Department of Health, Education & Welfare ("HEW") asserting the FRS, in the payment of its optional joint-annuitant retirement benefits, discriminated against males under Title IX of the Education Amendments of 1972 (*see* D.Exs. 1 & 2; *see also* R18-81 to 82).

Those charges were apparently filed by employees of or retirees from the Pinellas County School Board and specifically asserted that, because of the application of sex-based actuarial factors in the calculation of the FRS' optional joint-annuitant benefits which resulted in males receiving smaller monthly retirement benefits than similarly situated females, males suffered unlawful discrimination under Title IX (D.Ex. 5).

In November 1979 HEW found under 45 C.F.R. § 86.56 (b)(2) of its Title IX regulations that, because the FRS exacted equal contributions from or on behalf of similarly situated males and females, the State did not discriminate in its payment of lower optional joint-annuitant benefits to males as contrasted with similiarly situated females (D.Ex. 5). The State interpreted this to mean that they could "go on and proceed what they were doing" (R18-82, lines 17-18) — that at least for the purposes of Title IX the State's use of sex-based mortality tables in the calculation of the FRS' optional joint-annuitant retirement benefits "was not discriminatory" (R18-84, lines 24-25, & R18-85, lines 1-2—testimony of defendant Smith).

Preliminaries aside, defendant Smith (now Vila—see defendants' initial petition (No. 86-1685) at pp.iii n.2 & xi n.5) was chief executive officer of the State's Department of Administration ("DOA") from July 1979 to January 1985 (R18-74). He was fully aware of *Manhart* and over a five to six year period repeatedly readdressed the issues raised thereby (R18-74 to 77). Indeed, DOA went to the Florida Legislature every year from 1979 through 1983 on the unisex issue (*e.g.*, R18-77 & 86; R19-5 to 6; R21-132).

The 1979 Florida Legislature responded by amending *Fla. Stat.* § 112.66 (1978 Supp.) to provide in subsection (9) thereof, *see Fla. Stat.* § 112.66(9) (1979) (A128):

> No [Florida government pension] plan shall discriminate in its benefit formula based on color, national origin, sex, or marital status. Nothing herein shall preclude a plan from actuarially adjusting benefits or offering options based on sex, age, early retirement, or disability.

(*e.g.*, R19-76 to 77 & R19-143 to 144). Subsequent Legislatures did not feel compelled to deal with the issue (R19-5 to 6; R18-95 to 96). Moreover, and in point of fact, the 1983 Legislature was provided with a comprehensive and detailed internal staff briefing memo on this unisex retirement benefit issue in February 1983 (D.Ex. 9) which concluded that "[t]he issues regarding the use of sex-linked mortality tables in the calculation of retirement benefits are still very much unresolved in the wake of *Manhart*" (D.Ex. 9-15).

In any event, defendant Smith repeatedly sought and received advice from his staff on the unisex issue (R18-78 to 83). His chief legal advisor, former DOA general counsel David V. Kerns who is a noticed unnamed class member herein appearing on his own behalf (*see* R18-147 to 148; *see also* defendants' initial certiorari petition (No. 86-1685) at pp.iv-v), was of the opinion that *Manhart* was not controlling and did not require the FRS to convert to unisex mortality tables for the calculation of its three optional joint-annuitant benefits (*see* R18-78 to 80; *see also* R18-148 to 151, 163, & 166 to 167). As a result of a query by Mr. Kerns, a junior attorney on his staff (Samantha Boge) prepared a memo dated 9/1/81 on the uni-

sex issue stating, among other things, that in her opinion the FRS had to convert to unisex (D.Ex. 14, PA127-PA 128).[1] However, Mr. Kerns did not agree with Ms. Boge's memorandum or its conclusion, as it did not explain away the distinguishing factors with which he was concerned (R18-153). Defendant Smith never saw Ms. Boge's memo (R18-109 to 110).

The State's consulting actuaries (Tillinghast, Nelson & Warren) likewise advised *Manhart* did not require the State to move to unisex tables for calculation of the FRS' optional joint-annuitant retirement benefits because the FRS' first and primary single life benefit was not based on sex (R18-80). Their advice in this regard (per Michael Tierney, who was the State's testifying actuarial expert at the February 1986 trial in this matter) was based on their "opinion that the *Manhart* decision did not address optional factors" in any retirement plan (*see* R19-172 & 198; *see also* R20-9 to 11).

Similarly, defendant McMullian was intimately involved in the *Manhart* discussion and did not feel *Manhart* was controlling on the FRS (R18-188; R18-80) for much the same reasons that Mr. Kerns did (R19-44). The opinion of Mr. McMullian's chief legal advisor, Augustus Aikens,[2] was the same (R18-188). A junior attorney un-

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[1]This is the same memorandum which plaintiffs refer to and partially quote at pp. 9-10 in their cross-petition for certiorari.

[2]Mr. Aikens subsequently was promoted from chief legal advisor for the Division of Retirement within the State's Department of Administration ("DOA") to general counsel (i.e., chief legal advisor) for DOA. Note that Mr. Aikens appears as co-counsel on this brief as well as on the State's initial certiorari petition (No. 86-1685).

der Mr. Aikens (Diane Keisling) provided Mr. McMullian with a memo dated 7/10/81 expressing her opinion that *Manhart* compelled the FRS to convert to unisex (D.Ex. 16, PA124-PA126).[3] Just as Mr. Kerns with respect to the Boge memo above referred to, neither Mr. McMullian nor Mr. Aikens agreed with the conclusion reached by Ms. Keisling in her memo (R18-189 to 191). Indeed, not only did Mr. Aikens disagree with Ms. Keisling's memo, he represented the State in plaintiff Long's unsuccessful appeal to the Florida 1st District Court of Appeal, *see Long v. Dep't of Administration, Div. of Retirement,* 428 So.2d 688 (Fla. 1st DCA 1983), as well as in the administrative proceedings giving rise thereto (*see* R3-47-1 *et seq.* & R4-74-1 *et seq.*), and appears as co-counsel in the instant matter (*see* n.2 herein *supra*). Defendant Smith also never saw Ms. Keisling's memo (R18-109 to 110).

It should also be noted that during this same time frame the opinions expressed in national publications which were reviewed by Mr. McMullian were likewise to the effect that *Manhart* was not controlling (*e.g.,* R19-92).

With the exception of a June 25, 1981 letter by defendant McMullian (P.Ex. 40, PA121-PA123) (*see* plaintiffs' cross-petition at p.9), the only other memoranda focused upon by plaintiffs in their cross-petition (*see* cross-petition at pp.7-9) were three of several written by Lawrence Gibney, the Division of Retirement's in-house actuary (P.Ex. 20, PA101-PA108; P.Ex. 21, PA109-PA114; P.Ex. 25, PA115-PA120). However, Mr. Gibney wrote two

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[3]This is the same memorandum which plaintiffs refer to and partially quote at p.9 in their cross-petition.

other memoranda (P.Ex. 22; P.Ex. 23)[4] to which plaintiffs do not refer. Moreover, the only other memoranda extant in this case on the unisex issue are those of Mr. Gibney, and plaintiffs fail to point out that Mr. Gibney's memoranda are not so unequivocal as they submit, especially when taken as a whole (*see generally* P.Exs. 20-25) and especially when placed in the context of Mr. Gibney's February 1986 trial testimony (*see* R21-3 to 59). Furthermore, Mr. Gibney maintained the view that *Manhart* neither compelled nor provided clear direction for the State to convert to unisex mortality tables for the calculation of its optional joint-annuitant benefits (*see* R21-22 to 25, 28 to 29, & 58 to 59).

Within this context note that the opinions of Mr. Gibney were relayed to Secretary Smith[5] through Mr. McMullian (R18-79). At best it can be said Mr. Gibney was somewhat prescient, for his opinion was that someday the use of unisex tables would be mandated for optional retirement benefits although such was *not* mandated by *Manhart* (*see* R18-79 to 80; *see also* R21-22 to 25, 28 to 29, & 58 to 59). Additionally, he conducted a survey which established as of June 1979 that, of 29 state retirement plans responding, only six had converted to unisex tables for the calculation of retirement benefits (*see* D.Ex. 19 or P.Ex. 3; *see also* P.Ex. 24).

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[4]The dates of these memoranda are, respectively, August 9, 1978 (P.Ex. 22), and November 25, 1978 (P.Ex. 23).

[5]See defendants' initial April 21, 1987 petition (No. 86-1685) at xi n.5 & p.iii n.2.

Subsequent to each and every one of the memoranda/letters which plaintiffs herein assert create the "bad faith" issue and, indeed, subsequent to every unisex memorandum/letter in evidence in this case (with the exception of D.Ex. 9, the 1983 Florida Legislature's staff briefing memo), among other times the unisex issue was explored in great detail at a meeting on September 4, 1981, involving defendants Smith and McMullian as well as Mr. Kerns, Mr. Aikens, Mr. Gibney, and Lou Dennard (who was Mr. McMullian's assistant retirement director) (R18-87 to 90, 141 to 142, & 194 to 195; R21-34 to 35 & 48). The consensus arrived at in that meeting was that *Manhart* was not controlling, that there was no clear direction for the FRS to go to unisex tables for the calculation of its optional benefits, let alone how it properly and legally might do so (*Ibid*), and that the matter should be taken back to the Florida Legislature[6] which, as already noted above (*see* herein *supra* at pp.4-5), took no action.

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REASONS FOR DENYING THE WRIT

I. Question 1

Notwithstanding plaintiffs' assertions of conflict with decisions of this Court because the lower courts herein refused to order topping up of benefits beyond the unisex level, in point of legal fact there is none—not with this Court's applicable decisions and not with circuit court decisions which have addressed the issue. Moreover, even if there were conflict, plaintiffs have in no way come

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[6]At this point in time, the next session of the Florida Legislature would have been Spring 1982.

close to demonstrating the requisite "abuse of discretion" which is the standard of review they must meet in order to succeed on this point. *See, e.g., Norris v. Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans,* 796 F.2d 1119, 1121 (9th Cir. 1986), *appeal following remand from,* 463 U.S. 1073 (1983) (*"Norris II"*); *Cox v. American Cast Iron Pipe Co.,* 784 F.2d 1546, 1562 (11th Cir. 1986).

In *Manhart, supra* 435 U.S. at 719 n.36, this Court gave clear indication that relief only to the unisex mortality table level should be that which is considered in a Title VII pension case. In *Norris,*[7] 463 U.S. at 1111 n.4, Justice O'Connor also clearly indicated that relief in a Title VII pension benefit case such as this should not be beyond the unisex mortality table level. Moreover, in his *Norris* dissent on the non-retroactive liability issue Justice Marshall (joined by Brennan, White, and Stephens) was quite clearly considering the award of retroactive relief only up to the sex-neutral (i.e., unisex) mortality table level, *Id.* 463 U.S. at 1093-95.

Moreover, the one circuit which has squarely addressed the issue is the 9th Circuit in *Norris II,* in the appeal following this Court's 1983 *Norris* remand.[8] Therein the 9th Circuit affirmed that the award of relief to the

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[7]*Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris,* 463 U.S. 1073 (1983) (*"Norris"*).

[8]*Norris v. Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans,* 796 F.2d 1119 (9th Cir. 1986), *appeal following remand from,* 463 U.S. 1073 (1983) (*"Norris II"*).

unisex mortality table level was all that was required, *Id.* 796 F.2d at 1121-22.

As for plaintiffs' Equal Pay Act argument, they raised no Equal Pay Act claim in the trial court (*see* "Statutes Involved" herein *supra* at p.2). At best they have an argument under the Bennett Amendment, 42 U.S.C. § 2000e-2(h). But *Norris II, supra* 796 F.2d at 1123-24, again disposes of plaintiffs' argument without conflict, as does Justice O'Connor's concurrence in *Norris, supra* 463 U.S. at 1111 n.4. Further, even if plaintiffs had raised an Equal Pay Act claim in the district court, the 9th Circuit's decision in *Probe v. State Teachers' Retirement System,* 780 F.2d 776, 783-84 (9th Cir.), *cert. denied,* — U.S. —, 90 L.Ed.2d 978 (1986) (*"Probe"*), would nevertheless completely dispose of plaintiffs' argument again without conflict.

In short, there is no conflict on this issue—not with the applicable decisions of this Court and not with the applicable decisions of the circuit courts. Indeed, just the contrary is true. On this issue the decisions below fully comport with applicable precedent on the matter. In other words, plaintiffs simply have not met the standards of Supreme Court Rule 17 which would justify the grant of review and, accordingly, review must be denied.

II. Question 2

With respect to the issue of "bad faith", the decisions below turn on the facts of this case (*see* "Statement of the Case" herein *supra* at pp.2-9; *see also* plaintiffs' "Statement of the Case" in their cross-petition at pp. 3-13). Resolution of the bad faith issue, if it even be rele-

vant, will affect no one but the litigants in this case. Indeed, the issue does *not* even involve an important question of federal law.

Moreover, plaintiffs have an erroneous view as to the relevance and importance of bad faith. Plaintiffs assume that if they can establish bad faith such will entitle them to additional relief in the nature of punitive damages. However, plaintiffs fail to focus on the fact that this is exclusively an action under Title VII which authorizes only equitable relief, *e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 442-47 (1975) (Rehnquist, J., concurring), and that even the award of backpay under Title VII is in the nature of equitable restitution rather than damages, *Ibid.* Equity allows only a "make whole" remedy—it never has and does not authorize the award of punitive damages. As the district court awarded more than equity would allow as a matter of law (*see* Parts I., II.A, & II.B. under "Reasons for Granting the Writ" in defendants' initial April 21, 1987 certiorari petition (No. 86-1685) at pp. 14-21), there is no basis in the law of equity for urging that the district court should have awarded even more than it did. Thus the issue of bad faith is irrelevant.

However, be such as it may (and regardless of plaintiffs' contentions), the standard of review is that of "clearly erroneous" as the 11th Circuit correctly noted, 805 F.2d at 1550 (A19, PA20-PA21). With respect to the finding of no bad faith, such is analogous to a finding of no intent to discriminate, and in this case such finding of lack of bad faith is manifestly not clearly erroneous (*see* "Statement of the Case" herein *supra* at pp.3-9). Indeed, that finding and its affirmance are entirely in

accord with this Court's decision in *Pullman-Standard v. Swint,* 456 U.S. 273, 276 & 287-93 (1982).

Further, and for whatever relevance such may have, it should also be briefly noted that this Court's statement in *Albemarle, supra,* 422 U.S. at 422,[9] upon which plaintiffs base their argument, was not a holding in that case. While the statement may be true in a broad general sense, in the context of *Albemarle* the statement is dictum, for therein the district court's finding of no bad faith was not challenged. Additionally, this Court remanded *Albemarle* for further determination of whether the award of backpay might nevertheless be barred because of the particular facts of that case, *Id.* 422 U.S. at 423-25.

Moreover, the 11th Circuit's affirmance of the trial court's finding of lack of bad faith was entirely in accord with its own precedent, *see Intern'l Food & Beverage Systems v. City of Ft. Lauderdale, Fla.,* 794 F.2d 1520, 1526 (11th Cir. 1986), as well as that of other jurisdictions, *e.g., Kalvar Corp. v. United States,* 543 F.2d 1298, 1301-02 (Ct. Cl. 1976), *cert. denied,* 434 U.S. 830 (1977).

In short, the district court's finding of no bad faith was not clearly erroneous, and the 11th Circuit correctly recognized this. There is no conflict nor any important

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[9]To quote in pertinent part:

> When an employer *has* shown bad faith—by maintaining a practice which he knew to be illegal or of highly questionable legality—he can make no claims whatsoever on the Chancellor's conscience. [Emphasis by this Court.]

federal question. Accordingly, review must again be denied.

III. Question 3

Again, and despite plaintiffs' contentions, there is no conflict. The district court's only error was awarding any relief of any kind to the pre-*Manhart* retirees[10] in this case (*see* Part II.A. under "Reasons for Granting the Writ" in defendants' initial certiorari petition (No. 86-1685) at pp.18-20)—not in failing to award them retrospective adjustment of benefits in addition to prospective adjustment of benefits.

Plaintiffs' urging that additional relief be awarded the pre-*Manhart* retirees herein is an argument that this Court create additional conflict with its *Norris* decision as well as the 9th Circuit's decision in *Retired Public Employees' Ass'n of California v. State of California*, 799 F.2d 511 (9th Cir. 1986) (*again see* Part II.A. under "Reasons for Granting the Writ" in defendants' initial certiorari petition at pp.18-20)—it is not an argument that this Court resolve existing conflict. In essence, plaintiffs urge hereunder that this Court depart from the principles of stare decisis and adherence to previous precedent.

Again plaintiffs have come nowhere close to meeting the standards of Supreme Court Rule 17 which would justify the grant of review and, accordingly, review must again be denied.

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[10]*See* defendants' initial April 21, 1987 certiorari petition (No. 86-1685) at p.6 & n.10.

CONCLUSION

Because the questions raised by plaintiffs present no conflict with decisions of other federal courts of appeals on the same subject matter, no conflict with applicable decisions of this Court, and no important questions of federal law which have not been but should be settled by this Court, defendants/cross-respondents respectfully request that plaintiffs' cross-petition for writ of certiorari be denied.

Respectfully submitted,

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